

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**August 29, 2000**

**IN RE:**

**TARIFF FILING BY BELL SOUTH  
TELECOMMUNICATIONS, INC.,  
TO REDUCE GROUPING RATES  
IN RATE GROUP 5 AND IMPLEMENT  
A 3 PERCENT LATE PAYMENT CHARGE  
AND**

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**DOCKET NO. 00-00041**

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**DISSENTING OPINION OF DIRECTOR MALONE TO THE  
ORDER REVERSING INITIAL ORDER AND APPROVING TARIFF**

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The majority announced the determination of two prime questions of law en route to reversing the Hearing Officer's Initial Order and approving this Tariff. Dispositive or not, questions of law were indeed in need of resolution. Here, however, the majority failed to adequately support its "legal" position by citation or authority; and, conversely waxed eloquently on matters of fact without the benefit of an evidentiary record.

Inexplicably, along the way, the majority proceeded to weave into its deliberations "legal" threads made up almost entirely of "testimony-less" findings of fact. Undoubtedly, reliance on findings of fact to aid in resolving conclusions of law is not particularly odd, unless, as in this instance, a Hearing has not been held, nor an evidentiary record established. In so acting, the majority, in my opinion, overextended itself by basing its ruling on an inadequate "record" and, in the bargain, needlessly encroached, without remorse, on the fundamental right of parties to due process. *See Tennessee Consumer Advocate vs. Tennessee Regulatory Authority*, No. 01A01-9606-BC-00286, LEXIS 148 (Tenn. Ct. App. 1997) (Court held that the failure to

provide adequate notice of the matter to be considered and full opportunity to interrogate, cross-examine and impeach demonstrated that “the [Public Service] Commission was unfamiliar with basic rules of fairness[.]”). From this, I am compelled to distance myself.

The Majority’s Order in this case lacks the depth necessary to follow the bases for arriving at either a legal or factual conclusion; but, instead, fashions administrative closure with broadly erected deliberative platitudes. Whether the ultimate result of the majority’s decision was correct or not is hardly the issue, but rather that the official record upon which the decision was made is incapable of supporting the weight of the “legal” determinations made. For in this instance, said determinations were, either by their nature or unintentionally, inextricably intertwined with factual conclusions. The incomplete state of the record, the not so subtle determination of factual issues, and the withholding of an opportunity to interrogate, cross examine, and impeach all conspired against any success the majority may have desired in arriving at a sound decision.<sup>1</sup>

In an attempt to buttress its actions, the majority sought to create the previous existence of an “opportunity” to rebut factual conclusions incorporated into the majority’s decision making process by references to prior submissions of issue statements, briefs and the like by the parties. Suffice it to say, it is doubtful, at best, that the aforementioned submissions constitute the “opportunity” contemplated by the Court of Appeals.

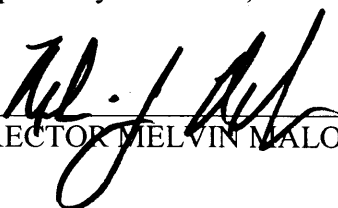
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<sup>1</sup> Additionally, the majority’s reliance upon tariffs and actions of other companies without prior notice and an opportunity to rebut create concern as well. *See* Tenn. Code Ann. § 4-5-313. Further, to state, after reviewing the transcript, that discussions deemed relevant by the majority relating, directly or indirectly, to factual issues, occurred during the non-evidentiary hearing at which the decision was made is an understatement.


It is my opinion that the infirmities in this decision are far too severe to ignore.<sup>2</sup> It is fiction to hold that only questions of law were addressed and supported when in actuality findings of fact were quietly embraced in support of the majority's decision without opportunity for rebuttal.

For the foregoing reasons, I am without choice and must dissent.

Respectfully submitted,

  
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DIRECTOR MELVIN MALONE

ATTEST:

  
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David Waddell, Executive Secretary

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<sup>2</sup> Although not the focus of my comments, the majority's seeming split, through deliberative comments, on whether the late payment is a telecommunication service, is noteworthy. One Director opined that the charge is a telecommunication service, while another Director opined that it is not a telecommunication service, but rather a "delinquent charge." The motion, however, carried in favor of the charge being characterized as a telecommunication service. This is an important point for two reasons. First, if the majority had not ruled so, it, by law, could not have exercised jurisdiction over the charge. Second, in so ruling, the majority necessarily, although apparently by its actions unwittingly, caused, at a minimum, the need for hearing to determine what, if any, statutory restrictions are applicable to new services before the tariff could lawfully be approved. This the majority did not do.